Before the **FEDERAL COMMUNICATIONS COMMISSION**

Washington, D.C. 20554

In the Matter of:)
2006 Quadrennial Review – Review of the)
Commission's Broadcast Ownership Rules) MB Dockets No. 06-121,
and Other Rules Adopted Pursuant to) 02-277, 01-235, 01-317, 00-244
Section 202 of the Telecommunications)
Act of 1996)
)
2002 Biennial Regulatory Review - Review)
Of the Commission's Broadcast Ownership)
Rules and Other Rules Adopted Pursuant to)
Section 202 of the Telecommunications)
Act of 1996)
)
Cross-Ownership of Broadcast Stations and)
Newspapers)
Rules and Policies Concerning Multiple)
Ownership of Radio Broadcast Stations in)
Local Markets)
Zoom mande	,)
Definition of Radio Markets	,)
	<i>'</i>

To The Commission and the Media Bureau

COMMENTS OF CATHERINE J.K. SANDOVAL, ASSISTANT PROFESSOR OF LAW, SANTA CLARA UNIVERSITY; CAROLYN BYERLY, Ph.D., ASSOCIATE PROFESSOR, DEPARTMENT OF COMMUNICATIONS, HOWARD UNIVERSITY; AND AKILAH FOLAMI, ASSISTANT PROFESSOR, HOFSTRA UNIVERSITY SCHOOL OF LAW¹ REGARDING THE STUDY COMMISSIONED BY THE FEDERAL COMMUNICATIONS COMMISSION IN THE ABOVE PROCEEDINGS, "MINORITY AND FEMALE OWNERSHIP IN MEDIA ENTERPRISES," BY ARIE BERESTEANU AND PAUL B. ELLICKSON, AND THE CRITIQUE OF PROFESSOR B.D. MCCULLOUGH'S "PEERREVIEW REPORT" OF THE BERESTEANU AND ELLICKSON STUDY

October 19, 2007

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¹ Thanks to the excellent research assistance and contributions to drafting this text by Santa Clara University Law (SCU Law) Students Eli Edwards, Oscar Warren Hunter and SCU Law graduate Rae Roulston.

I. Introduction: The FCC Media Ownership Proceeding and Summary of Critique of the Beresteanu and Ellickson Study

In 2002, the Federal Communications Commission (FCC) undertook a review of the Commission's broadcast ownership rules pursuant to section 202(h) of the Telecommunications Act of 1996.² The FCC examined its rules including: cross-ownership of newspapers and television in the same market, and radio and television cross-ownership; multiple ownership of radio or television stations in local markets; its definition of radio markets; and the failed station solicitation rule (FSSR).³ This review resulted in the FCC's 2003 promulgation of a dramatic revamp of the ownership regulations, including the elimination of the cross-ownership rules, which were replaced by new cross media limits, a revision of how the Commission defines radio and television markets; and the elimination of the FSSR.⁴ These rules were challenged, and in 2004, the U.S. Court of Appeals for the Third Circuit found portions of the new regulations to be inadequately justified, with insufficient factual or legal basis to constitute rational decisionmaking. The court remanded those portions for reconsideration by the FCC. In response, the FCC initiated its 2006 Further Notice of Proposed Rulemaking (FNPRM) to examine several media ownership rules and asked for comments on steps to promote minority and female access to FCC licenses.6

² 47 U.S.C. § 161 (2000) (requiring that the Commission review its rules relating to telecommunications operators and providers every two years and, upon a finding that such rules are no longer in the public interest, to repeal or modify those rules).

³ FCC, Further Notice of Proposed Rulemaking (FNPRM), 2006 Quadrennial Regulatory Review- Review of the Commission's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, et. al, MB Docket No. 06-121, ¶1 (July 24, 2006), available at http://fjallfoss.fcc.gov/edocs-public/attachmatch/FCC-06-93A1.pdf. [hereinafter *Broadcast Ownership Review FNPRM*].

⁴ 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 FCC Rcd 13620, 13711-47 (2003).

⁵ Prometheus Radio Project et al. v. F.C.C. 373 F.3d 372, 405 (3rd Cir. 2004).

⁶ 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other

The Telecommunications Act of 1996 obligates the Commission to review its media ownership rules to determine "whether any such rules are necessary in the public interest as a result of competition" and to "repeal or modify" any regulations that do not meet this standard. In furtherance of this goal, the FCC commissioned (at public expense) multiple studies on media ownership relating to the issues that the Third Circuit remanded in <u>Prometheus</u>. The FCC has sought comments on these studies and their relevance to its rulemaking. This comment is in response to Beresteanu and Ellickson's 2007 study, "Minority and Female Ownership in Media Enterprises." It will address the FCC's mandate to promote the public interest and to promote diversity and access to media ownership for minorities and women.

Our comments will focus on the Beresteanu and Ellickson study's failure to: 1) consider the public interest as the guiding principle for communications analysis; 2) their use of the wrong data to analyze minority and female FCC license ownership, relying instead on data which included content providers, thus inflating the numbers they use for comparison; 3) their limited analysis of lack of access to capital and its relationship to FCC rules, and their failure to analyze the influence of consolidation and other FCC rules on minority and female broadcast license ownership; 4) the lack of foundation for their conclusions about content and ownership; 5) and their assumption that the internet can be an adequate, or even sensible substitute for broadcast media, without considering the gaps in internet adoption and the continuing requirement that broadcasting serve the public interest. The pervasive methodological flaws in the Beresteanu and

Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Further Notice of Proposed Rule Making, 21 FCC Rcd 8834 (2006).

⁷ 47 U.S.C. § 161 (2000).

⁸ See press release: FCC Seeks Comment on Research Studies on Media Ownership (July 31, 2007), available at: http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A1.pdf (Pursuant to this Public Notice, the Commission seeks public comment on the studies...The Commission will incorporate the studies and the public comments in the record of this proceeding. The studies will also be peer-reviewed. The Commission intends to use the data collected in the studies, as well as the comments, to inform its decisions in the ownership proceeding.)

⁹ Arie Beresteanu and Paul B. Ellickson, Minority and Female Ownership in Media Enterprises, Duke University, (June 2007) *available at*, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A8.pdf.

5Ellickson study should compel the FCC not to rely on that study as part of its examination of the media ownership rules and their relationship to minority and female ownership. Due to the Beresteanu and Ellickson study's serious methodological and conceptual flaws, any reliance on it for the FCC's rulemaking would not meet the rational decision-making standard to which the FCC is held.

II. The Public Interest is the Touchstone of Broadcast Regulation

The fundamental assumptions underlying any research matter greatly to the strength and credibility of the findings and conclusions that the research produces. At the outset, we would like to comment on the faulty underlying assumptions in Beresteanu & Ellickson's 2007 study, "Minority and Female Ownership in Media Enterprises," prepared for and submitted to the FCC.

First, among these assumptions is that female and minority ownership in broadcast industries can be meaningfully compared along gender and race lines to other non-farm industries. In fact, such a broad comparison should not be made because broadcast industries differ from other industries in a number of significant ways. Broadcast industries utilize *public airwaves*, something that other non-farm industries do not. Since the airwaves are a public resource, U.S. communication law has always required that their users serve "the public interest, convenience and necessity." ¹⁰

Beresteanu & Ellickson attribute the public concern about minority and women ownership of radio and television licenses to their belief that "[s]ince these are high profile

¹⁰ Communications Act of 1934, 47 U.S.C. § 307 (2000) (The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act [47 USCS §§ 151 et seq.], shall grant to any applicant therefor, a station license provided for by this Act); *See also*, 47 U.S.C. § 309 (2000).

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industries, responsible for dissemination of information to a large fraction of the population, many people believe the federal government (and the Federal Communications Commission (FCC), in particular) should play an active role in ensuring equal access to these outlets." Any attempt to characterize the FCC's duty to foster access to and diversity in radio and television as simply the product of the high profile nature of the media misses the mark and the law by ignoring the statutory mandates that require the FCC to regulate the use of the *public airwaves* so they *serve the public interest*.

The Communications Act of 1934 limited the grant of a license to operate a broadcast station to those for whom the FCC determined the "public convenience, interest, or necessity will be served thereby..." The Telecommunications Act of 1996 (1996 Act) reaffirmed Congress' decision that the radio spectrum should be regulated in the public interest. ¹³ In its rulemaking on media ownership, the FCC made concrete its vision of the public interest, highlighting the goals of promoting competition, diversity, and localism. ¹⁴ The FCC has recognized that "[t]here are five types of diversity pertinent to media ownership policy: viewpoint, outlet, program, source, and minority and female ownership diversity." Recognizing broadcasting's important role in

¹¹ Beresteanu and Ellickson, *supra* note 9, at p. 2.

¹² 47 U.S.C. § 307 (2000); 47 U.S.C. § 309 (2000).

¹³ 47 U.S.C. § 303 (2000) (In enumerating the powers of the Commission, the Telecommunications Act provides that "Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall... [s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest") *See also* 47 U.S.C. § 307 (2000) (Detailing the standard to be used by the Commission in granting of radio licenses, "The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.").

¹⁴ 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Further Notice of Proposed Rule Making, 21 FCC Rcd 8834 paragraph 4 (2006) ([T]he Commission determined that its long-standing goals of competition, diversity, and localism would continue to guide its actions in regulating media ownership.); 18 FCC Rcd 13620 paragraph 41 (2002) (The rules we adopt to promote competition, diversity, and localism also will serve the public interest by ensuring that multiple owners control the broadcasting outlets in any market.).
¹⁵ *Id.* at paragraph 18.

disseminating news and public affairs information and in fostering democratic debate, 16 Congress has long required that broadcasting be regulated in the public interest.

Congress adopted structural regulations on media ownership to encourage diversity in the use of the public airwaves. ¹⁷ The 1996 Telecom Act codified the current limits on the number of radio and television stations that one entity may control in a market, although it directed the FCC to periodically review those regulations, thus spawning the FCC's current Media Ownership Proceeding.¹⁸

The 1996 Act also codified the FCC's duty to promote broad access to the radio spectrum without the taint of discrimination, by requiring the FCC to regulate "so as to make available, so far as possible, to all people of the U.S., without discrimination on the basis of race, color, religion, national origin, or sex...a world-wide wire and radio communications service." ¹⁹ Additionally, the 1996 act went beyond non-discrimination goals to mandate that the FCC take steps to foster inclusion of minorities and women in the provision of spectrum-based services. Section 309(j) of the 1996 Act which governs use of competitive bidding as a mechanism to allocate license provides:

(3)[T]he Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote...the following objectives:

¹⁶ Federal Communications Commission v. League of Women Voters 468 U.S. 364 (1984) ([W]e have long recognized that Congress, acting pursuant to the Commerce Clause, has power to regulate the use of this scarce and valuable national resource. The distinctive feature of Congress' efforts in this area has been to ensure through the regulatory oversight of the FCC that only those who satisfy the "public interest, convenience, and necessity" are granted a license to use radio and television broadcast frequencies. 47 U.S.C. § 309(a); See also, National Broadcasting Co., Inc. v. United States 319 U.S. 190 (1943) (The 'public interest' to be served under the Communications Act is thus the interest of the listening public in 'the larger and more effective use of radio'. § 303(g)...In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity).

See Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 136 (1973).

¹⁸ The Telecomm.Act eliminated the national cap on the number of AM or FM radio stations a single entity could control and established ownership limits per geographical market, based on the number of radio stations in the market, prompting a wave of consolidation. 1996 Telecomm. Act, §§ 202(a), (c)(1)(B), 110 Stat. at 110-11; \$202(b)(1), 110 Stat. at 110.
¹⁹ 47 U.S.C. 151 (2000).

...(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(4) In prescribing regulations pursuant to paragraph (3), the Commission shall— ...(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures. ²⁰

Congress also required the FCC to conduct an inquiry into market entry barriers that limit the access of small and minority owned businesses and rural telephone companies to telecommunications services, and to take steps to eliminate those barriers to favor "diversity of media voices... and promotion of the public interest, convenience, and necessity."²¹ Thus, Congress codified the imperative and established the means to increase access to the airwayes for minorities and women. In line with long-standing statutory directives, these mandates require that the FCC take steps to increase minority and female access to the airwaves, and are not merely a suggestion in light of the industry's profile as Beresteanu & Ellickson imply.

The public interest requirement suggests that the broadcasting industry should be compared (if at all) to other industries and institutions similarly regulated in the public interest, not to all non-farm industries generally. However, although some other industries (e.g., health care, transportation, utilities) must also meet federal or state regulations, and corresponding agencies are established to monitor their compliance with such purposes, none of those utilizes a public resource, such as the public airwayes that broadcast industries use. Therefore, broadcasting must be examined within the context of its specific statutory mandates.

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²⁰ 47 U.S.C. § 309(J)(3) (2000). ²¹ 47 U.S.C. 257 (2000).

Second, Beresteanu and Ellickson's study takes no note of the statutory and legal context which mandated the Media Ownership Proceeding and the remand of the FCC's 2003 regulatory choices by the Third Circuit Court of Appeals in Prometheus. The Third Circuit chastised the FCC for, among other things, repealing without explanation or comment the Failed Station Solicitation Rule (FSSR) which required a television license or construction permit holder to provide notice of the sale to potential out-of-market buyers before it could sell the failed, failing or unbuilt television station to an in-market buyer. The Third Circuit concluded that the FCC's failure to mention anything about the effect this change would have on potential minority station owners evidenced a lack of reasoned analysis.

In repealing the FSSR without any discussion of the effect of its decision on minority television station ownership (and without ever acknowledging the decline in minority station ownership notwithstanding the FSSR), the Commission entirely failed to consider an important aspect of the problem, and this amounts to arbitrary and capricious rulemaking.²⁵

The Third Circuit found the FCC's repeal of the FSSR "inconsistent with the FCC's obligation to make the broadcast spectrum available to all people 'without discrimination on the basis of race." In remanding the FSSR to the FCC for reconsideration, the Third Circuit also required that the FCC address the proposals of the Minority Media and Telecommunications Council (MMTC) for promoting diversity in broadcasting at the same time that it considered the media ownership rules generally. ²⁷

²² *Prometheus*, 373 F.3d 372.

²³ *Id*. at 420

²⁴ Christine M. Bachen, Allen S. Hammond, IV & Catherine J.K. Sandoval, *Serving the Public Interest: Broadcast News, Public Affairs Programming, and the Case for Minority Ownership*, p. 299, in MEDIA DIVERSITY AND LOCALISM, MEANING AND METRICS (Phillip Napoli, ed., Lawrence Erlbaum Assoc., Publishers, 2007).

²⁵ *Prometheus*, 373 F.3d 372, 420.

²⁶ Bachen, Hammond, Sandoval, *supra* note 24 at 299 (citing Prometheus Radio Project v. F.C.C., 373 F.3d at 420). ²⁷ 373 F.3d 372, 420 n. 59.

The study of this important topic of minority and female access to the broadcast spectrum was commissioned by the FCC as part of its effort to address these legal requirements.

Unfortunately, the Beresteanu and Ellickson study assumes, by omission, that the history of race and sex discrimination in broadcast ownership and the legal efforts to address them are irrelevant. Such omission occurs by a failure to recognize that to serve the public interest means to include all sectors of the public (including females and racial minorities), or to consider statutes or case law requiring such considerations.

Their study does not examine the statutory and regulatory mechanisms that have been tried (and, in the case of tax certificates, abandoned, without an analysis of its effectiveness) to promote diversity in the use of the airwaves and enabled the few minorities and women who control FCC licenses to obtain those licenses. If, for example, most minority or female licensees obtained their first broadcast licenses through comparative hearings or the use of tax certificates for qualified minority buyers, that history would be important to identifying the success of FCC policies and the consequences of their repeal of abandonment. That first license is often the critical step in broadcast entry, opening the way for subsequent expansion in broadcasting. One hypothesis that should have been tested is whether the few current minority or female owners of broadcast licenses obtained their FIRST license through now abandoned FCC programs designed to encourage minority or female participation, indicating the importance of such programs in entry and success. It is crucial to examine exit and entry by minorities and females in the broadcast industry, and the extent to which it has been affected by the elimination of policies to promote their entry or by consolidation.

Beresteanu and Ellickson analyzed none of these issues, nor did they discuss the many other studies that have examined these issues, including those commissioned by the FCC for the

market entry barriers proceeding, ²⁸ and studies submitted to the FCC in its current media ownership proceeding. ²⁹ They also fail to address the recommendations of the FCC's Diversity Advisory Committee, ³⁰ or the many organizations that have submitted comments to the FCC on legal analysis and facts relevant to the FCC's media ownership proceeding. ³¹ This ahistorical approach devoid of legal and factual background or consideration of relevant literature is neither legally sufficient nor good social science.

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²⁸ See, for example, Christine Bachen, Allen Hammond and Laurie Mason and Stephanie Craft, DIVERSITY OF PROGRAMMING IN THE BROADCAST SPECTRUM: IS THERE A LINK BETWEEN OWNER RACE OR ETHNICITY AND NEWS AND PUBLIC AFFAIRS PROGRAMMING? (Report submitted to the Office of Communications Business Opportunities, FCC, 1999); William D. Bradford, DISCRIMINATION IN CAPITAL MARKETS, BROADCAST/WIRELESS SPECTRUM SERVICE PROVIDERS AND AUCTION OUTCOMES (Report submitted to the Office of General Counsel, FCC, 1999); KPMG LLC, BROADCAST LICENSING STUDY, ESTIMATION OF UTILIZATION RATES/PROBABILITIES OF OBTAINING BROADCAST LICENSES FROM THE FCC (Report submitted to the Office of General Counsel, FCC, 1999); Ernst & Young, FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority and Women-Owned Companies in FCC Wireless Spectrum Auctions (Report submitted to the Office of General Counsel, FCC, 1999); The Ivy Planning Group, Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing (Report submitted to the Office of General Counsel, FCC, 1999). available http://www.fcc.gov/opportunity/meb_study/. also, Kofi Asiedu Ofori, Civil Rights Forum See Communications Policy, When Being No. 1 is Not Enough; The Impact of Advertising Practices on MINORITY-OWNED & MINORITY-FORMATTED BROADCAST STATIONS (Report submitted to Office of Communications Business Opportunities, http://www.fcc.gov/Bureaus/Mass_Media/Informal/ad-study/.

²⁹ See, for example, Carolyn Byerly, Kehbuma Langmia, and Jamila.A. Cupid, MEDIA OWNERSHIP MATTERS: LOCALISM, THE ETHNIC MINORITY NEWS AUDIENCE AND COMMUNITY PARTICIPATION (2006), available at: http://www.benton.org/benton_files/MediaOwnershipReportfinal.pdf; S. Derek Turner, Mark Cooper, OUT OF THE PICTURE at p. 22, (2006) available at: http://www.stopbigmedia.com/files/out of the picture.pdf. (finding that television markets with minority owners are significantly less concentrated than markets without minority owners). Allen S. Hammond IV, THE IMPACT OF THE FCC's TV DUOPOLY RULE RELAXATION ON MINORITY AND WOMEN OWNED BROADCAST STATIONS 1999-2006, available at: http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A9.pdf (finding that in markets with television duopolies, the number of minority- owned stations dropped by 39%, compared to non-duopoly markets where the number of minority-owned stations dropped by 10%, and that female-owned stations were more likely to be found in non-duopoly markets).

Recommendations of the Advisory Committee on Diversity for Communications in the Digital Age, http://www.fcc.gov/DiversityFAC/recommendations.html. *See* recommendation on the Distress Sale Policy, June 1, 2004, http://www.fcc.gov/DiversityFAC/adopted-recommendations/DistressSalePolicyRecommend.doc. *See* also Adoption of an Declaratory Ruling on Section 310(b)(4) Waivers December 10, 2004, http://www.fcc.gov/DiversityFAC/adopted-recommendations/ForeignOwnershipFinal.doc.

³¹ See, for example, Allen S. Hammond IV and Catherine J.K. Sandoval, Declaration in Support of Comments filed on behalf of the Minority Media and Telecommunications Council, FCC Docket No. 04-228, In the Matter of Ways to Further Section 257 Mandate and to Build on Earlier Studies (Oct. 18, 2004), available at: http://www.fcc.gov (click e-filing, enter docket 04-288 and date submitted 10/18/2004).

II. Methodological Issues with the Study's Analysis of the Census 2002 Survey of Business Owners: The Census Categories Beresteanu and Ellickson use Include Businesses that are NOT FCC Radio and Television Broadcast Licensees, Making them an Inappropriate Benchmark for Minority and Female Broadcast Ownership

In addition to the concerns discussed above (i.e., questioning whether FCC radio and television license ownership for minorities and women can legitimately be compared to ownership levels in non-farm industries, and that the authors failed to address the FCC's statuory public interest obligations), the methodology that Beresteanu and Ellickson adopt is fatally flawed. The data which the authors analyze are derived from the U.S. Census Bureau's 2002 Survey of Business Owners (SBO). The Census Bureau uses the North American Industry Classification System (NAICS) to categorize industries for the SBO. Beresteanu and Ellickson use the 6-digit NAICS codes labeled "Radio Stations" code 515112, Television broadcasting, code 515120 and Newspaper Publishers, code 511110³² to create a data set that has no viability for this particular study.

Newspapers in the United States have historically enjoyed a different legal status than that of broadcast stations in that they do not utilize a public resource to disseminate their information.³³ As we have discussed at length above, broadcast technology utilizes airwaves that the public own, creating the basis for their requirement to serve the public interest and the regulatory mechanism (through the FCC) to monitor their compliance. Beresteanu and Ellickson fail to recognize that newspaper publishers are not regulated by the FCC and are not subject to the same public interest regulations as broadcasters.³⁴ Although the FCC is also examining

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³² Beresteanu and Ellickson, *supra* note 9, at 6-7.

³³ Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

³⁴ *Id*.

whether to modify its rules prohibiting newspaper-television cross-ownership within a market,³⁵ the paucity of minority or female newspaper owners is not addressed in those rules because of the FCC's lack of jurisdiction over newspapers, except as they relate to broadcast cross-ownership. Thus, our comments will focus in more detail on the range of problems associated with findings derived from analysis of these data as a means to creating benchmarks for minority and female ownership of radio and television licenses.

The NAICS codes start with 3 digits for broad categories and get narrower at the 4-, 5- and 6-digit level. The "Corresponding Index Entries" are all the types of firms that nest within a given code. The problem with using these codes in an attempt to analyze broadcast ownership trends is that the NAICS codes group together several types of businesses, many of which DO NOT require FCC licenses to operate. For instance, as indicated in Attachment "A," the Census includes the following index entries within the category of "Radio Stations" (515112):

"AM radio stations; Broadcasting stations (except exclusively on Internet), radio; Broadcasting studio, radio station; FM radio stations; Music program distribution (except exclusively on Internet), radio; Piped-in music services, radio transmitted; Radio broadcasting (except exclusively on Internet) stations (e.g., AM, FM, short); Radio stations (except exclusively on Internet); Rebroadcast radio stations (except exclusively on Internet);

While some of these classifications require FCC licensees, many are not limited to FCC licensees such as "music program distribution" and "piped-in music services."³⁷

http://www.census.gov/epcd/naics02/def/ND515112.HTM.

³⁷ *Id*.

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³⁵ Broadcast Ownership Review FNPRM, supra note 3 at ¶1, n. 8 (FNPRM includes examination of 47 C.F.R. §73.3555(c) (2005) (prohibiting cross-ownership of a daily newspaper and a broadcast station in the same market)). ³⁶ U.S. Census Bureau, 2002 NAICS Definitions, 515112 Radio Stations, available at:

The same problem arises with the authors' attempt to use the NAICS classification (515120) for television broadcasting as a benchmark for minority and female broadcast ownership. As indicated in Attachment "B," the corresponding index entries indicate that the code is used for television broadcasting stations, whose owners must be FCC licensees, and television broadcast networks, which are not owned by FCC licensees. 38

Relying on the SBO data, Beresteanu and Ellickson conclude that "the three media industries are basically in line with the broad universe of firms with regard to the status of female ownership."³⁹ With regard to minority ownership, they conclude that "[a]s is the case with female ownership, the data reveal that these three industries are not out of line with the economy as a whole."

However, their conclusion is based on census numbers which are BROADER than the universe of FCC licensees so the data does NOT support their conclusion. Using the SBO data in this manner results in what at first glance appear to be higher base-line numbers for "Radio Stations" and "TV Stations" because the numbers are inflated by using content providers such as piped-in music services and networks which are not FCC licensees. The authors' conclusions are unfounded since the data they rely on is too broad, resulting in higher apparent numbers than the universe of FCC licensees that is at issue in the media ownership proceeding.

The Beresteanu and Ellickson report also does not attempt to reconcile the discrepancies between SBO data with that of the FCC, which they cite on minority and women broadcast ownership in Table 11 of their study. Table 11 shows that according to the FCC data (which

³⁸ U.S. Census Bureau, 2002 NAICS Definitions, 515120 Television Broadcasting, available at: http://www.census.gov/epcd/naics02/def/ND515120.HTM.

³⁹ Beresteanu and Paul B. Ellickson, *supra* note 9, at 8.

several scholars have criticized as flawed and incomplete),⁴⁰ in 2002 women owned 2.98% of radio stations and 1.55% of television stations.⁴¹ Diverging sharply from the FCC data, the Census data SBO categories classify 14.01% of the businesses within the "Radio Stations" code and 13.67% of the businesses within the "Television Broadcasting" code as women owned,⁴² due to the expansive definition of such businesses to include content providers and networks who are not FCC licensees.

Similarly, the Census SBO data classify 10.5% of the businesses within the "Radio Stations" code as minority owned, due to the expansive definition of such businesses to include content providers and networks who are not FCC licensees. The FCC data in Table 11 shows that for the same time period, minorities owned 2.76% of radio stations and 1.15% of television stations. In pointed contrast, the census classifies 16.96% of "Television Broadcasting" firms as minority owned, again due to the inclusion of content providers and networks not regulated by the FCC, and likely due to the definitions of ownership and control used by the census that do not adequately account for U.S. Law and FCC policies. While the FCC data are incomplete and flawed, the SBO data includes too many companies that are NOT FCC licensees, making it an *invalid yardstick* for measuring minority and women ownership trends as required by the Third Circuit in Prometheus.

⁴⁰ See, for example, Carolyn M. Byerly, Questioning Media Access: Analysis of Women and Minority FCC Ownership Data (2006), available at: http://www.benton.org/benton_files/MediaOwnershipReportfinal.pdf; S. Derek *Turner* and Mark N. Cooper, The Lack of Racial and Gender Diversity in Broadcast Ownership and the Effects of FCC Policy: An Empircal Analysis, (2007) [hereinafter *Lack of Racial and General Diversity in Broadcast Ownership*], available at: http://web.si.umich.edu/tprc/papers/2007/735/Turner_TPRC.pdf; and C. Anthony Bush, Ownership Structure and Robustness of Media: Technical Appendix, p. 18, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A3.pdf.

⁴¹ Beresteanu and Paul B. Ellickson, *supra* note 9, at 22, Table 11.

Compare, Turner and Cooper, Lack of Racial and General Diversity in Broadcast Ownership, supra note 40, abstract p. 1 (analyzing broadcast ownership data to conclude that in 2007 racial and ethnic minorities own 7.7 percent of full-power commercial broadcast radio stations, and women own 6 percent).

⁴² Beresteanu and Paul B. Ellickson, *supra* note 9, at 6.

⁴³ *Id*. at 7.

⁴⁴ Beresteanu and Paul B. Ellickson, *supra* note 9, at 22, Table 11.

⁴⁵ Id.

The definitions the Census used to determine when a firm is owned by a minority or a woman also makes it an unreliable basis for determining minority or female FCC licensee ownership, even if the categories could be separated to exclude non-licensees. The Census includes businesses in the above categories when minorities or females own either 50% of the equity of the firm or have 50% of the voting control. Although the FCC has changed the definition over the years as to which firms are minority or female owned, the agency requires licensees to report who is responsible for and in control of the license and whether that person is a member of a minority group or a female.

The high number the Census reports for Hispanic ownership of TV stations, 6.04%, reflects not only the participation of Hispanic firms in the provision of content and network services outside of the definition of FCC licensees, but also is likely to include equity investments by foreigners who are Hispanic and who the law specifically prohibits from controlling a broadcast license. The Communications Act of 1934 forbade foreigners from controlling broadcast licenses. Spanish International Network (SIN) (a predecessor to Univision, currently the largest Spanish-language television broadcaster in the United States) was required to divest its broadcast licenses after the FCC determined that the non-U.S. citizens who held a substantial amount of Univision's equity also had control over the licenses in

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 ⁴⁶ Beresteanu and Paul B. Ellickson, *supra* note 9 at 4; *See also*, 2002 Economic Census: Survey of Business Owners Methodology, *available at* http://www.census.gov/econ/census02/text/sbo/sbomethodology.htm#sampling.
 ⁴⁷ Report and Order, In the Matter of 1998 Biennial Regulatory Review Streamlining of Mass Media Applications, Rules, and Processes Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, MM Docket Nos. 98-43; 94-149, FCC 98-281 (1998); 13 FCC Rcd 23056 (1998).

⁴⁸ 47 U.S.C. § 310 (2000) (Prohibiting the granting or holding of broadcast licenses to "any foreign government or the representative" or "any alien or the representative of any alien" or "any corporation organized under the laws of any foreign government" or "any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country").

contravention of U.S. law.⁴⁹ SIN was required to sell its licenses, which were subsequently transferred to Hallmark; Hallmark later sold them to Univision; Univision sold its interests to Broadcast Media Partners in 2007, a consortium of private equity firms.⁵⁰ The Census data's definitions of ownership as either equity or voting control do not adequately account for the requirements of U.S. law regarding control of the license, making in an inappropriate basis for comparison or conclusions about broadcast licenses.

In addition, even if accurate data were used to compare FCC radio and television LICENSEES to other industries, the authors do not analyze the duty of the government to take steps to promote minority or female participation where the evidence supports the conclusion that the government has underutilized such businesses in light of past discrimination in the industry or by the government, and to further its interests in widespread control of licenses, program diversity and service to the public interest. The FCC has a duty to analyze the utilization of minorities and women as FCC licensees in light of industry and governmental practices including, but not limited to, barriers to capital access, which are incorporated into FCC licensing procedures that rely on capital such as auctions. Nor does the study analyze the FCC's affirmative duties to promote the inclusion of minorities and women in spectrum-based services codified in section 309(j) of the 1996 Act and serving the FCC's diversity goals.

In sum, Beresteanu and Ellickson rely on the wrong data which includes content providers and studio facilities other than FCC licensees in an attempt to analyze the status of minority and women FCC licensees. The definitions of ownership used in the Census data are at odds with FCC practice and Congressional statute. Even if such comparisons were founded on

⁴⁹ Communication Technology Update 72 (August E. Grant & Jennifer Harmon Meadows eds., Focal Press 10th ed. 2006) (1992).

⁵⁰ *Id.* In the Matter of Shareholders of Univision Comm., Inc. and Broad. Media Partners, Inc. for Transfer of Control of Univision and Certain Subsidiaries, Memorandum Opinion and Order, BTCCT-20060718AGOetal, 3-4, March 27, 2007, *available at* http://www.fcc.gov/transaction/univision.html.

better data, the FCC still is mandated by Congress to take steps to encourage the participation of minorities and women in spectrum-based services, and must consider how its media ownership policies affect their participation.⁵¹

III. Access to Capital and Minority and Female Broadcast License Ownership

Based on their flawed data analysis, Beresteanu and Ellickson conclude that "the observed ownership asymmetries are economy-wide, they are undoubtedly linked to broad systematic factors. While some of this pattern may well be due to discrimination, the most direct explanation lies in unequal access to capital (which may itself be rooted in discrimination, or other long standing [sic] disadvantages)."52 They use data from the U.S. Federal Reserve (Fed) to conclude that "non-minorities control a much larger fraction of aggregate wealth than minorities, allowing them to own a much larger fraction of businesses."53 They make similar conclusions for women, citing a study that finds "1) business ownership is related positively to income and negatively to poverty; 2) these correlations are stronger for women-owned firms than for all firms."54 Such observations are made without critique, in other words, without an explanation as to why they are problematic generally or, more specifically, how such discrimination associated with utilization of the public airwaves requires regulatory intervention to provide remedy.

As a result, their study does not examine the FCC's use of auctions which rely on the ability to raise capital as a licensing mechanism. Though the 1996 Act codified the use of

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⁵¹ Telecommunications Act of 1996, 47 U.S.C. § 309(j) (2000). See also Prometheus v. FCC, 373 F.3d 372, 420 (3rd

⁵² Beresteanu and Ellickson, *supra* note 9, at 8.

⁵³ *Id.* at 10. ⁵⁴ *Id.*

auctions as a licensing procedure, the requirement to examine broadcast rules should include an examination of the effect of auctions, which incorporate access to capital as the driving element in whether a firm will obtain a license.⁵⁵ The dearth of minority and female representation among FCC licensees cannot be dismissed with Beresteanu and Ellickson's broad conclusion based on faulty data that "under-representation of females and minorities is an economy-wide phenomenon, it is not industry specific."⁵⁶

The role of access to capital in minority and female representation in broadcast ownership was examined in depth by Professor William D. Bradford's study for the FCC in 1999, "Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes." Professor Bradford found that for both FCC wireless license applicants and broadcast licensees, "minority-owned firms and women-owned firms are less likely to receive debt financing in the capital markets than nonminority-owned firms...received loans from financial institutions pay higher interest rates than nonminority firms when we control for relevant variables." He also found that both minority and women-owned businesses have lower probabilities of winning wireless spectrum licenses in auctions after controlling for relevant variables. Professor Bradford recommended that "the FCC continue to examine the effect of capital markets on the participation of minority- and women-owned firms in the ownership and operation of broadcast and spectrum licenses... to confirm and track these effects over time."

⁵⁵ Telecommunications Act of 1996, 47 U.S.C. § 309(j) (2000) (Allowing the FCC to institute a competitive bidding process for licenses when multiple mutually exclusive applications are accepted). *See also Prometheus v. FCC*, 373 F.3d 372, 385 (2004) (47 U.S.C. § 161 requires that the FCC review its rules biennially and repeal or modify any rules found not to be in the public interest).

⁵⁶ Beresteanu and Ellickson, *supra* note 9, at 8.

⁵⁷ William D. Bradford, DISCRIMINATION IN CAPITAL MARKETS, BROADCAST/WIRELESS SPECTRUM SERVICE PROVIDERS AND AUCTION OUTCOMES, supra note 28, Executive Summary. ⁵⁸ *Id.*

⁵⁹ *Id*.

Beresteanu and Ellickson's analysis does not use the statistical regression analysis that Professor Bradford used, nor is it based on an examination of the experience of applicants for FCC licenses. While continued examination of the role of access to capital in FCC licensing is merited, such examination requires much more depth and detail than was used in Beresteanu and Ellickson's study.

To determine the causes of minority and female underrepresentation among broadcast licensees, the FCC needs to examine a variety of factors including, but not limited to: the effect of FCC policies on minority and female broadcast ownership, including rules which permitted increased consolidation in the radio and television industry, particularly since 1996;⁶⁰ use of "Old-boy networks" that exclude minorities or women from information about broadcast deals, and the extent to which the FCC's rules incorporate those practices;⁶¹ industry customs that limit minority and female access to capital, and the extent to which those practices are embedded in government licensing schemes that rely on capital; practices in the advertising industry that affect the ability of minorities and women (particularly those who serve minority audiences) to earn revenues to maintain their stations and get capital to acquire other stations;⁶² racist threats against minority-owned broadcasters who attempt to serve minority audiences as were endured by James Wolfe who was threatened by the Klu Klux Klan for his plans to provide radio

⁶⁰ Turner and Cooper, *Lack of Racial and General Diversity in Broadcast Ownership, supra* note 40, abstract p. 4 (markets with minority owners are significantly less concentrated than those without).

⁶¹ The FCC's Failed Station Solicitation Rule (FSSR) was a race and gender-neutral attempt to overcome some of these information and "old-boy network" barriers by requiring a waiver applicant to provide notice of the sale to potential out-of-market buyers before it could sell the failed, failing, or unbuilt television station to an in-market buyer. 1999 Television Rule Review, 14 F.C.C.R. 12,903, ¶¶ 13-14, 74. In Prometheus Broad. v. FCC, the Third Circuit chastised the FCC for repealing that rule in 2003 without comment on its effect on minorities wishing to enter the broadcast industry, or considering other proposals to increase minority ownership. 373 F.3d 372, 405.

62 See, Philip M. Napoli, Audience Valuation and Minority Media: An Analysis of the Determinants of the Value of Radio Audiences, 46 J. BROADCASTING & ELECTRONIC MEDIA 169, 181 (2002) (finding that stations whose audiences were more than 50% racial or ethnic minorities earned less advertising revenues than those whose audiences were predominantly non-minority).

programming targeted at African-Americans; ⁶³ and other barriers that impede minority and female ownership. The FCC already has before it an ample record of these findings, as well as the comments and suggestions of the Minority Media and Telecommunications Council, the Diversity Advisory Committee and other organizations and scholars who have documented the myriad factors contributing to minority and female underrepresentation including the FCC's licensing policies. ⁶⁴

IV. The Relationship between Content and Ownership

Beresteanu and Ellickson contend that "recent research suggests that media content is driven much more by demand considerations (i.e. consumer preferences) than supply factors (i.e. ownership preferences). For this conclusion, they rely exclusively on a study of the newspaper industry by Gentzkow and Shapiro, *What Drives Media Slant, Evidence from U.S. Daily Newspapers*. Although their conclusions depend entirely on this newspaper study, Beresteanu and Ellickson again fail to recognize the different legal status that the newspaper industry has compared to that of broadcast. For example, Beresteanu and Ellickson do not even address whether conclusions about media ownership and content in the newspaper industry are comparable to broadcasting in light of the differences in their business models, audience and

⁶³ The Ivy Planning Group, Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing, *supra* note 28 at 53.

⁶⁴ See MMTC Comments in 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 FCC Rcd 13620, 13711-47, paragraphs 49-50 (2003). See also Comments of Catherine J.K. Sandoval, Leonard M. Baynes, Allen S. Hammond, IV, Carolyn Byerly and Federico Subvervi. re: 2006 Quadrennial Review of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act of 1996, (October 23, 2006), available at

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native or pdf=pdf&id document=6518535748.

⁶⁵ Beresteanu and Ellickson, *supra* note 9 at 13.

⁶⁶ Mathew Gentzkow and Jesse M. Shapiro, *What Drives Media Slant, Evidence from U.S. Daily Newspapers*, May 24, 2007, *available at*, http://faculty.chicagogsb.edu/matthew.gentzkow/biasmeas081507.pdf.

regulatory schemes. Nor do they cite or attempt to distinguish this largely unrelated research from more closely aligned (and appropriate) research on the broadcasting industry which has demonstrated a nexus between ownership and content.⁶⁷

Even assuming newspaper ownership had any predictive basis or value for the behavior of broadcast owners, the study design by Gentzkow and Shapiro used the NewsLibrary and ProQuest Newstand databases analyzing English-language dailies only.⁶⁸ Thus, their study excluded all non-English-language newspapers, whether minority or female-owned or not, and all newspapers which were not published daily.

Recognizing the important role played by non-English language newspapers and those that do not publish daily, in its 2002 Biennial Review Order, the FCC in its examination of the rule prohibiting cross-ownership of a newspaper and a television station in the same market revised the definition of a newspaper subject to the rule from the previous definition of a "daily newspaper" as one that was published at least four times a week in English" to "include non-English language newspapers published in the primary language of the market."

In comments filed by Professors Sandoval, Baynes, Hammond, Byerly and Subvervi regarding the FCC's proposed studies for the media ownership proceedings, these scholars of law and media cautioned about the pitfalls of the FCC's previous exclusion of Spanish-language

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⁶⁷ See, for example, Christine Bachen, Allen Hammond and Laurie Mason and Stephanie Craft, Diversity of Programming in the Broadcast Spectrum: Is there a Link between Owner Race or Ethnicity and News and Public Affairs Programming? *supra* note 28.

⁶⁸ NewsLibrary contains over 1600 sources; *see* http://nl.newsbank.com/nl-search/we/Archives?p_product=NewsLibrary&p_action=home&p_theme=newslibrary2&s_home=home&s_sources =home&p_clear_search=&s_search_type=keyword&s_place=&s_category=none for complete source list. ProQuest Newstand contains over 300 including trade magazines; *see*

http://il.proquest.com/products_pq/descriptions/newsstand.shtml. *See also*, e-mail from Jesse Shapiro to Eli Edwards, September 12, 2007 (study sample used list of English-language daily newspapers with searchable full text on either the NewsLibrary or ProQuest databases at the time at which they conducted the searches) (on file with Professor Sandoval); e-mail from Matthew Gentzkow to Eli Edwards, September 13, 2007 (study used English language dailies which (i) appeared to have complete coverage for 2005 and (ii) had at least one hit among their search terms) (on file with Professor Sandoval).

⁶⁹ Broadcast Ownership Review FNPRM, supra note 3 at n. 66 (citing) 2002 Biennial Review Order, 18 FCC. Rcd at 12747 para. 328, 13799-800 paras. 457-58.

and other non-English-language newspapers and television from its analysis of the effect of newspaper ownership on television news. 70 Studies based on methodologies that exclude non-English outlets over-predict the effect of newspaper ownership on news quantity or quality, and are inconsistent with the FCC's revised definition of relevant newspapers. The Gentzkow and Shapiro study's exclusive focus on English newspapers thus makes it inappropriate for newspaper-television cross-ownership analysis, let alone any attempt to predict the effect of ownership on content.

Additionally, their study of only daily publications severely limits the inclusion of publications owned by racial and ethnic minorities. The National Newspaper Association, a national organization of Black newspapers, indicates that most of its 200 member papers publish weekly. ⁷¹ Those weekly minority-owned newspapers would thus be excluded for the databases used in the Gentzkow and Shapiro studies.

Moreover, a comparison of the databases Gentzkow and Shapiro used with the information contained in a survey of ethnic media outlets indicate that Gentzkow and Shapiro's methodology may have minimized the inclusion of ethnic-owned media.⁷² The databases and the study design Gentzkow and Shapiro used to indicate "bias" in newspaper reporting, while not intended to exclude ethnic media, appear to do exactly that.⁷³ They determined that the terms

⁷⁰ See Comments of Catherine J.K. Sandoval, Leonard M. Baynes, Allen S. Hammond, IV, Carolyn Byerly and Federico Subvervi. re: 2006 Quadrennial Review of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act of 1996, at 5 (October 23, 2006), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518535748.
 Interview by Dr. Carolyn M. Byerly of Hazel Trice Edney, National Newspaper Association, September 17, 2007

⁽on file with Dr. Byerly).

⁷² See generally Newslibrary source list, supra note 68. See also ProQuest Newsstand title list, supra note 68. The last print edition of the NCM Directory, National Ethnic Media cites to more than 2000 outlets, including print, broadcast and online sources. See also *NCM directory*, national ethnic media, 2nd ed. (New California Media, 2005). The 2007 online directory of ethnic media outlets lists over 1170 ethnic newspapers, separate from other media formats. See also National American Media, NAM National Ethnic Media Directory (Newspapers), available at: http://news.newamericamedia.org/directory/sub_category.html?id=d90d54781ae652ee457ae44bee3b1d98. ⁷³ Gentzkow and Shapiro's study is a working paper and they have indicated that a full dataset will be released upon final publication. See Gentzkow and Shapiro's emails, supra note 66.

"African-American," "Asian and Pacific Islander," and "Central American" were associated with "Democratic slant," while "immigration reform" was associated with "Republican slant." This led to the exclusion of at least one African-American owned daily newspaper included in the databases they rely upon for its frequent use of the term "African-American."

These methodologies limit the extent to which Gentzkow and Shapiro's conclusions should be generalized to predict behavior in the "newspaper industry" or the influence of ownership on content. At best, their study only predicts the behavior of those included in the study after they culled out others through the use of limited databases and by removing as "outliers" newspapers which too frequently, in their view, mentioned the terms above.

Gentzkow and Shapiro make no claims that their study predicts the behavior of those excluded from the analysis. Yet, Beresteanu and Ellickson, without any analysis of these severe methodological limitations, conclude that the Gentzkow and Shapiro study indicates there is no link between ownership and content, without recognizing that the Gentzkow and Shapiro study largely excluded minority ownership.

Additionally, Gentzkow and Shapiro's conclusion that newspaper content responds to readership demand does not address the relationship between content and demand. Does a newspaper's publication of stories favorable to or critical of a public figure or issue shape public opinion about that issue? If so, what is characterized as "demand" has been influenced by the "supply" and the content-biases of those who control newspapers. One study cited in the Prometheus case found that reporters claimed they felt pressured not to produce or air stories that

⁷⁴ Gentzkow and Shapiro, *supra* note 66 at 11-13, 51-52 (methodology for "Selecting Phrases for Analysis" and "Table 1: *Politically loaded phrases from the 2005 Congressional Record*").

⁷⁵ Gentzkow and Shapiro, *supra* note 66 at 8, n. 12 "One additional newspaper – the Chicago Defender – is present in the news databases, but is excluded from our analysis because it is an extreme outlier (more than 13 standard deviations away from the mean) in the distribution of slant. The vast majority of hits for this paper are for the single term "African American," which is strongly predictive of liberal ideology in Congress."

undermined the interests of their corporate owners.⁷⁶ Might similar pressures in the newspaper and broadcast industries affect what is published and thus public perception or demand for stories or particular "slants?"⁷⁷

A review of the Gentzkow and Shapiro indicates that their study was not designed to test the role of race or gender in newspaper content, and that their methodology would have been ill-suited to do so. Thus, Beresteanu and Ellickson's conclusion that the Gentzkow and Shapiro suggests that female or minority owners would not deviate from the profit maximizing choice and offer an alternative viewpoint is based on a distortion of the Gentzkow and Shapiro study and the data it used. The Gentzkow and Shapiro study design contained so few minority and female owners of newspapers that it cannot predict their behavior with regard to content.

Beresteanu and Ellickson attempt to use a study primarily documenting the behavior of whitemale newspaper owners to make claims about how minority broadcast owners would behave with regard to content. This method is ill-conceived, leading to unfounded conclusions and misinterpretation of the Gentzkow and Shapiro study.

V. The Internet Is Not a Substitute for Broadcast Media

In their section, "Rethinking the Problem," Beresteanu and Ellickson suggest that "[i]f the government is interested in maximizing the number of voices that get heard (or at least have

⁷⁶ Prometheus Radio Project et al. v. FCC, 373 F.3d 372, 400 (citing David Pritchard, VIEWPOINT DIVERSITY IN CROSS-OWNED NEWSPAPERS AND TELEVISION STATIONS: A STUDY OF NEWS COVERAGE OF THE 2000 PRESIDENTIAL CAMPAIGN (FCC Media Ownership Working Group Study No. 2) (Sept. 2002) (finding that in order to protect the reputation and credibility of their employer media outlets, some reporters have been willing to slant their news reports to reflect more closely the views of "the people upon whose goodwill their papers depend for revenue").

⁷⁷ See, Laura Stein, Speech Rights in America, the First Amendment, Democracy and the Media at 39 (University of Illinois Press, 2006) (citing Robert C. Picard and Jeffrey H. Brody, The Newspaper Publishing Industry at 89 (Allyn & Bacon, 1997) (in the 1980's and 1990's newspapers increasingly sought smaller and more profitable audience segments, altering their subject matter and news content to appeal to more affluent readings and cutting circulation in high-cost areas or in areas that did not reach advertisers' desired demographics).

method of doing so that has little (if any) downside."⁷⁸ They note that "[m]ore and more people are getting news and information from non-traditional sources, the most important of which is the internet. There are news sites, information sites, opinion sites, and a wide array of blogs catering to almost every segment of the population."⁷⁹ While the 1996 Act did include a goal of providing access to advanced telecommunications services to all Americans at reasonable rates, ⁸⁰ the internet is not a substitute for broadcasting that would allow the FCC to ignore its obligation to ensure that broadcasting serves the public interest.

Moreover, serious access gaps with respect to the internet persist, particularly among low-income Americans, the elderly, people with less than a college education, non-English speaking Americans and racial and ethnic minorities. The Pew Internet and American Life Project found that as of early 2007 only 47% of Americans had broadband access. Although this is an improvement over 2003 when only 20% of Americans had broadband access, the majority of Americans still do not have such access. Additionally, broadband adoption in the U.S. from March 2006 to March 2007 was the lowest that it has been in the past five years at twelve percent.

⁷⁸ Beresteanu and Ellickson, *supra* note 9 at 14.

 $^{^{79}}$ Id

⁸⁰ Telecommunications Act of 1996, § 706, P.L. 104-104, Title VII, § 706, 110 Stat. 153. (The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.)

⁸¹ Pew Internet and American Life Project: John B. Horrigan and Aaron Smith, HOME BROADBAND ADOPTION, 2, (2007) available at http://www.pewinternet.org/pdfs/PIP_Broadband%202007.pdf.

⁸² Id..

⁸³ *Id*.

A full 29% of Americans have no internet access at all, ⁸⁴ with approximately 27% stating that they do not own a computer. ⁸⁵ Minorities and low-income Americans tend to lag behind other segments of the population with respect to internet usage, representing what is commonly referred to as a "digital divide" along the lines of class, race, age, gender and education. For example, 71% of white Americans had internet access, while only 60% percent of African Americans and 56% of Latinos had access. ⁸⁶ 80% of Americans with income above thirty thousand dollars have access to the internet, while the number sharply declines to 53% for Americans making less than thirty thousand. ⁸⁷

With so many Americans falling victim to the digital divide, current government programs fall woefully short with respect to bridging the gap and promoting access. Most of the programs that the government has focused on have been narrowly directed at institutions and organizations to try and expand internet access. The Technology Opportunity Program, which was administered by the Department of Commerce, provided grants to organizations (including schools and hospitals) to implement community based technology programs. ⁸⁸ The program was discontinued in early 2003. ⁸⁹ In 1997, Congress created the Discount Telecommunications Services Program (E-Rate) to ensure that all eligible schools and libraries have affordable access to modern telecommunications and information services. Up to 2.25 billion is available to these institutions, which are eligible to receive between a twenty and ninety percent discount.

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⁸⁴ *Id.* at 3.

⁸⁵ Id.

⁸⁶ Pew Internet and American Life Project: Susannah Fox and Gretchen Livingston, LATINOS ONLINE (2007), 10, available at: http://www.pewinternet.org/pdfs/Latinos_Online_March_14_2007.pdf.

⁸⁷ Pew Internet and American Life Project: Mary Madden, INTERNET PENETRATION AND IMPACT (2006), 4, available at: http://www.pewinternet.org/pdfs/PIP Internet Impact.pdf.

⁸⁸ Report from National Telecommunications and Information Administration, COLLECTED CASE STUDY EVALUATIONS: SUMMARY OF FINDINGS (September 1999) available at: http://www.ntia.doc.gov/top/research/EvaluationReport/case_studies/casestudysummary.pdf.

⁸⁹ Pew Internet & American Life Project: John Horrigan, WHY IT WILL BE HARD TO CLOSE THE BROADBAND DIVIDE (2007) available at: http://pewresearch.org/pubs/556/why-it-will-be-hard-to-close-the-broadband-divide.

The narrow focus of government programs on public institutions creates many disadvantages for Americans seeking access to the internet, especially young minorities. Public schools and libraries have set hours of operation, thus limiting access for students who depend on these institutions for the internet. ⁹⁰ In addition, shared access at public libraries and schools creates quality issues ⁹¹ linked to time constraints; these programs are also subject to governmental budget cuts. ⁹² Given these obstacles, it becomes less likely that current government programs aimed at promoting access to the internet will be effective at bridging the digital divide.

Even if the disparities in access to the internet did not exist among low-income, elderly and minority Americans, the internet may not be effective as an independent source of local news. The Third Circuit in Prometheus challenged whether internet users are finding local independent news sources online. A 2004 report by the Pew Research Center noted that, while 41% "regularly" visited online news sites, only 9% pointed their browsers at "Local TV/Paper" websites. The majority visited AOL or Yahoo news, Network TV news websites, National newspapers websites, or online magazine/opinion sites. The Third Circuit noted that "t]here is a critical distinction between websites that are independent sources of local news and websites of local newspapers and broadcast stations that merely republish the information already being reported by the newspaper or broadcast station counterpart. The latter do not present an "independent" viewpoint and thus should not be considered as contributing diversity to local

⁹⁰ Leonard M. Baynes, *Race, Media Consolidation, and Online Content: The Lack of Substitutes Available to Media Consumers of Color*, 9, 39 U. MICH. J.L. REFORM 199(2006).

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⁹² *Id*.

⁹³ Prometheus, 373 F.3d 372, 405.

⁹⁴ Pew Research Center for People and the Press: Media Consumption and Believability Study (2004) available at: http://people-press.org/reports/pdf/215.pdf.

markets."⁹⁶ The fact that users are visiting established media sites instead of local news sites calls into question the argument that the internet is a substitute for the broadcast media.

The FCC cannot serve its commitment to the public interest by citing the internet as an adequate substitute for broadcast radio and television when statistics show that such a large portion of the population does not have access to the internet, and 75% of those without access do not even have a computer at home. The Third Circuit in Prometheus questioned the FCC's conclusion that the internet was a substitute for broadcasting and the ensuing years have demonstrated they are still not comparable. Moreover, while promoting internet access, as well as computer access and training are laudable goals, they are not substitutes for ensuring that broadcasting serves the public interest. In light of statutory directives that broadcasting serve the public interest and its continuing role as the source most people rely upon for news and public affairs information, internet access is not a substitute for broadcast access and service to the public interest.

VI. Conclusion

In conclusion, we emphasize that the Beresteanu and Ellickson study is fundamentally flawed. It relies on the wrong data, which in turn yields over-inflated numbers of minority and

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which to access the internet.). *See also* Comments of Catherine J.K. Sandoval, Leonard M. Baynes, Allen S. Hammond, IV, Carolyn Byerly and Federico Subvervi. re: 2006 Quadrennial Review of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act of 1996, at 3 (October 23, 2006), *available at*

⁹⁶ Prometheus, 373 F.3d 372, 406.

⁹⁷ General Accounting Office, Broadband Deployment Is Extensive throughout the United States, but It Is Difficult to Assess the Extent of Deployment Gaps in Rural Areas (2006), *available at*, http://www.gao.gov/new.items/d06426.pdf (Finding that 34 percent of households did not own a computer with

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518535748 (Noting that any attempt to analyze the sources from which people obtain news and information should be careful to explore the extent to which pricing connected to pay services such as the internet, including the cost of obtaining a computer and computer training, creates serious barriers to universal access of internet service).

women firms participating in what the census categories as "Radio Stations" or "Television Broadcasting," but which also include content providers, studios and networks. The data are not matched precisely enough to the universe of FCC licensees which the FCC must regulate in the public interest to have any predictive or analytical value.

Beresteanu and Ellickson's suggestion that lack of access to capital is the key problem affecting minority and female broadcast ownership lacks the methodological rigor of previous studies that used regression analysis to examine the FCC's record. Their study also fails to examine the extent to which the FCC's own practices (codified by Congress in the 1996 Act) replicate and embed access to capital problems through licensing systems such as auctions which rely on access to capital, or the effect of consolidation policies, particularly since the 1996 Telecom Act, on minority or female broadcast ownership.

In addition, Beresteanu and Ellickson' reliance on Gentzkow and Shapiro' study of English-language dailies in the newspaper industry to predict broadcast owner behavior with regard to content is methodologically unsound. Beresteanu and Ellickson ignore the extent to which Gentzkow and Shapiro's study of the newspaper industry largely excluded minority and possibly female newspaper owners since it was limited to English-language dailies contained in certain databases. Nor does the Gentzkow and Shapiro study establish that newspaper industry behavior predicts broadcaster behavior, particularly that of minority or women broadcasters. Again, the data they offer up do not support Beresteanu and Ellickson's conclusions.

Nor is their suggestion that the government focus on increasing internet access as a way of "Rethinking the Problem" an appropriate solution. While we would agree that increasing internet access is a laudable and important goal, we find no research to support their contention that the internet is a substitute for broadcasting. In fact, an emerging body of research suggests

that the internet is used to supplement, rather than replace more traditional media formats such as television and radio. 98 Nor would having increased internet access negate the FCC's legal requirement to ensure that the publicly-owned broadcast spectrum is managed in the public interest.

We recommend that the serious flaws with the data and analysis in the Beresteanu and Ellickson study strongly demonstrate that it must not be used as part of the basis for any rational decision-making by the FCC. While <u>Prometheus</u> required the FCC to examine proposals for minority and female ownership as part of its media ownership proceeding, the Beresteanu and Ellickson study is unable to satisfy that requirement and should not be relied upon either in analyzing the status or in taking the appropriate steps to address the deeply serious present inequities in minority and female broadcast ownership.

In light of the serious methodological and conceptual flaws in the Beresteanu and Ellickson study, and the failure to vet the study's methodology before it was undertaken, the FCC should commission a study which analyzes the issues described above in analytical depth using rigorous methods, subject to prior comments about its scope and methodology. That study must take into account the law, the effect of past and present licensing and regulatory policies and other factors that limit minority or female ownership, and the role of industry practices on minority and female broadcast ownership and the extent to which FCC policies incorporate those

⁹⁸ See, for example, C. M. Byerly, K. Langmia, and J. A. Cupid, OWNERSHIP MATTERS: LOCALISM, THE ETHNIC MINORITY NEWS AUDIENCE AND COMMUNITY PARTICIPATION," in *Does Bigger Media Equal Better Media*, (Report), Social Science Research Council and Benton Foundation, 2006, http://www.ssrc.org/programs/media.

practices. The FCC should not adopt any changes to the media ownership regulations until it has completed such as systematic analysis and considered the effect of its rules on minority and female ownership, as mandated by the Third Circuit in Prometheus.

October 19, 2007

Sincerely,

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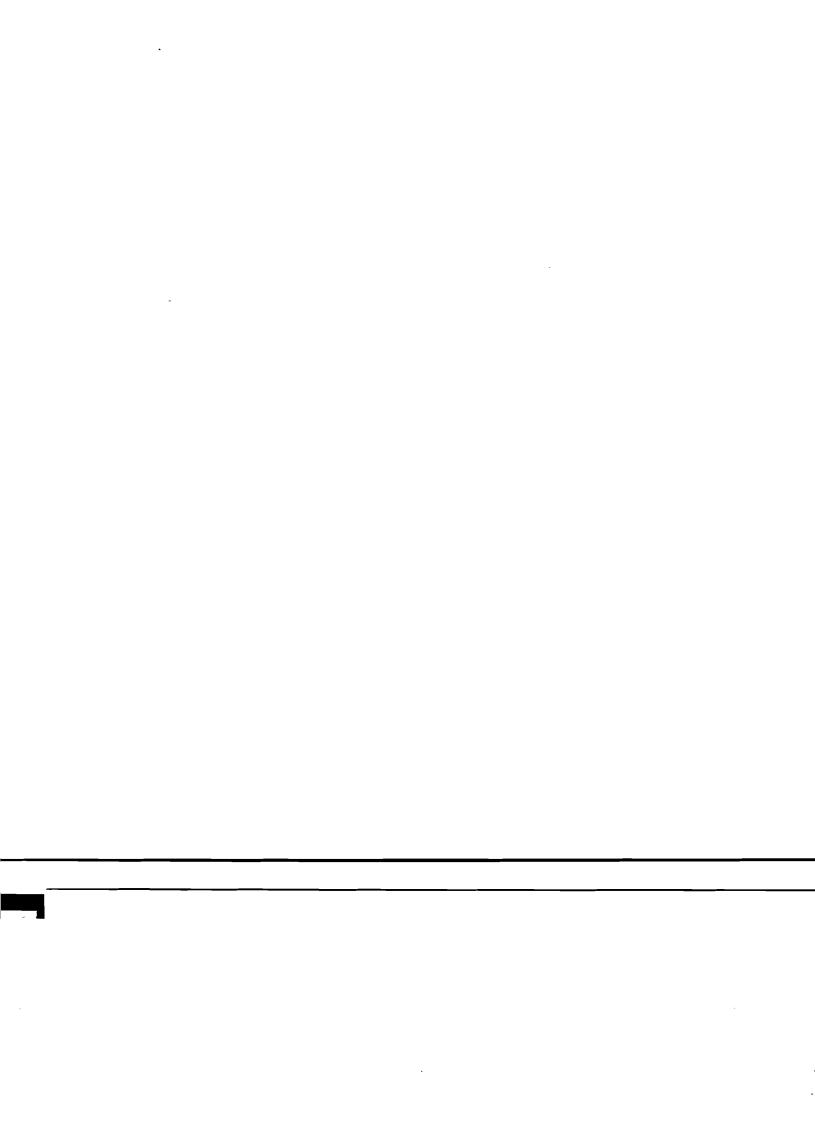
Carrey Byerry

Howard University

Akilah Folami

Assistant Professor

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U.S. Census Bureau

2002 NAICS Definitions

"Attachment A"

515112 Radio Stations

This U.S. industry comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources.

Go	2002 NAICS to 1997	2002 NAICS to 1987	1997 Economic	Bridge Between 1997 NAICS
to:	NAICS	<u>SIC</u>	Census	and SIC

2002 NAICS	1997 NAICS		f 'owngrouding Indox L'aturg
515112	513112	4832	AM radio stations
515112	513112	4832	Broadcasting stations (except exclusively on Internet), radio
515112	513112	4832	Broadcasting studio, radio station
515112	513112	4832	FM radio stations
515112	513112	4832	Music program distribution (except exclusively on Internet), radio
515112	513112	4832	Piped-in music services, radio transmitted
515112	513112	4832	Radio broadcasting (except exclusively on Internet) stations (e.g., AM, FM, short
515112	513112	4832	Radio stations (except exclusively on Internet)
515112	513112	4832	Rebroadcast radio stations (except exclusively on Internet)

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"Attachment A"

RADIO BROADCASTING STATIONS (SIC E4832)

Establishments primarily engaged in broadcasting aural programs by radio to the public. Included in this industry are commercial, religious, educational, and other radio stations. Also included here are establishments primarily engaged in radio broadcasting and which produce radio program materials. Separate establishments primarily engaged in producing radio program materials are classified in Services, Industry 7922.

U.S. Census Bureau

2002 NAICS Definitions

"Attachment B"

515120 Television Broadcasting

This industry comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources.

Cross-References. Establishments primarily engaged in--

- Broadcasting exclusively on the Internet--are classified in <u>Industry 516110</u>, Internet Publishing and Broadcasting;
- Producing taped television program materials--are classified in <u>Industry 512110</u>, Motion Picture and Video Production;
- Furnishing cable and other pay television services--are classified in <u>Industry 517510</u>, Cable and Other Program Distribution; and
- Producing and broadcasting television programs for cable and satellite television systems--are classified in Industry 515210, Cable and Other Subscription Programming.

Go	2002 NAICS to 1997	2002 NAICS to 1987	1997 Economic	Bridge Between 1997 NAICS
to:	<u>NAICS</u>	<u>SIC</u>	Census	and SIC

2002 NAICS	1997 NAICS	1987 SIC	Corresponding Index Entries
515120	513120	4833	Broadcasting networks, television
515120	513120	4833	Broadcasting stations, television
515120	513120	4833	Network television broadcasting
515120	513120	4833	Television broadcasting networks
515120	513120	4833	Television broadcasting stations

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"Attachment B"

TELEVISION BROADCASTING STATIONS (SIC E4833)

Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational, and other television stations. Also included here are establishments primarily engaged in television broadcasting and which produce taped television program materials. Separate establishments primarily engaged in producing taped television program materials are classified in Services, Industry 7812. Establishments primarily engaged in furnishing cable and other pay television services are classified in Industry 4841.